UNITED
NATIONS

A

General Assembly

Distr.
LIMITED

A/CN.4/L.491/Rev.2/Add.1
19 July 1994

ENGLISH
Original: ENGLISH

INTERNATIONAL LAW COMMISSION
Forty-sixth session
2 May-22 July 1994

WORKING GROUP ON A DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

Report of the Working Group

CONTENTS

Draft commentary to preamble and Parts 1 to 3 of the draft Statute (arts. 1 to 24)

Preamble

Commentary

(1) The preamble sets out the main purposes of the draft Statute, which is intended to further cooperation in international criminal matters, to provide a forum for trial and, in the event of conviction, to provide for appropriate punishment of persons accused of crimes of significant international concern. In particular it is intended to operate in cases where there is no prospect of those persons being duly tried in national courts. The emphasis is thus on the Court as a body which will complement existing national jurisdictions and existing procedures for international judicial cooperation in criminal matters and which is not intended to exclude the existing jurisdiction of national courts, or to affect the right of States to seek extradition and other forms of international judicial assistance under existing arrangements.

(2) The International Criminal Court envisaged by the draft Statute is intended to exercise jurisdiction only over the most serious crimes, that is to say, crimes of concern to the international community as a whole. Its jurisdiction is stated exhaustively in the Statute (see Part 3 below), and the circumstances in which it should exercise that jurisdiction are also carefully circumscribed.

(3) The purposes set out in the preamble are intended to assist in the interpretation and application of the Statute, and in particular in the exercise of the power conferred by article 35.

(4) Some members believed the preamble should be an operative article of the statute, given its importance.

PART I: ESTABLISHMENT OF THE COURT

Article 1: The Court

Commentary

(1) Part 1 of the draft Statute deals with the establishment of the Court. Article 1 formally establishes an International Criminal Court (hereinafter referred to as "the Court").

(2) The purpose of the establishment of the Court, as indicated in the preamble, is to provide a venue for the fair trial of persons accused of crimes of an international character, in circumstances where other trial procedures may not be available or may be ineffective.

(3) The question of the title to be given to the jurisdictional structure was the subject of some debate. In the 1993 Draft Articles the entity as a whole

was referred to as the "Tribunal", with the term "Court" reserved for the judicial organs. However some members thought that it was unusual to have a "Court" within a "Tribunal", and others preferred not to use the word "Tribunal" at all in relation to a permanent body intended to exercise criminal jurisdiction. The Working Group agreed that the term "Court" should be used to refer to the entity as a whole, and that where specific functions are intended to be exercised by particular organs (e.g. the Presidency, the Procuracy, the Registry), this would be specifically stated. References to "the Court" as a whole are made in a number of articles: these confer powers, functions or obligations on all the organs of the Court as described in article 5, or in the case of judicial powers, on the Presidency, a Trial Chamber, or the Appeals Chamber, as the case may be: see articles 4, 18, 24, 33, 43 and 51 (1).

Article 2: Relationship of the Court to the United Nations

Commentary

(1) Divergent views expressed in the Working Group and in plenary on the relationship of the Court to the United Nations. Several members of the Commission favoured the Court becoming a subsidiary organ of the United Nations by way of resolutions of the Security Council and General Assembly, without the need for any treaty. Others strongly preferred that it be created an organ of the United Nations by amendment to the Charter of the United Nations. Still others thought such an amendment unrealistic and even undesirable at this stage, and advocated another kind of link with the United Nations such as a relationship agreement along the lines of that concluded between the United Nations and the International Atomic Energy Agency (see the IAEA's Statute of 23 October 1956, article XVI, and General Assembly resolution 1145 (XII) of 14 November 1957).

(2) One view that was strongly advanced favoured a jurisdictional structure based on resolutions of the General Assembly and Security Council, on the ground that this would reflect the will of the international community as a whole, would be more flexible, and would bring the Court within the framework of the United Nations without the need for an amendment to the Charter. However the Working Group concluded that it would be extremely difficult to establish the Court by resolution of a United Nations body, without the support of a treaty. General Assembly resolutions do not impose binding, legal obligations on States in relation to conduct external to the functioning of the United Nations itself. In the present case important obligations - for example the obligation of a State to transfer an accused person from its own custody to the custody of the Court - which are essential to the Court's functioning could not be imposed by

resolution. A treaty commitment is essential for this purpose. Moreover, a treaty accepted by a State pursuant to its constitutional procedures will normally have the force of law within that State - unlike a resolution - and that may be necessary if that State needs to take action vis-à-vis individuals within its jurisdiction pursuant to the Statute. And, finally, resolutions can be readily amended or even revoked: that would scarcely be consistent with the concept of a permanent judicial body.

(3) As between the solution of a treaty and an amendment to the Charter, the majority of the Working Group preferred the former, and it is reflected in the text of article 2. This envisages a relationship agreement accepted by the competent organs of the United Nations and on behalf of the Court, but with the States parties to the Statute creating the Court assuming the responsibility for its operation. This relationship agreement would be concluded between the Presidency, acting on behalf of and with the prior approval of States parties, and the United Nations, and it would provide, inter alia, for the exercise by the United Nations of the powers and functions referred to in the Statute.

(4) On the other hand, some members felt strongly that the Court could only fulfil its proper role if it was made an organ of the United Nations by amendment of the Charter. In their view, the Court is intended as an expression of the organized international community as to its concern about and desire to suppress certain most serious crimes. It is logical that the Court be organically linked with the United Nations as the manifestation of that community. They would therefore prefer article 2 to provide simply that "The Court shall be a judicial organ of the United Nations".

(5) If this alternative were to be adopted it would have substantial implications for the operation and financing of the Court. For example, election of judges and other officers would naturally become a matter for Member States acting through the competent political organs of the United Nations. The Working Group envisages that such a solution would require amendment to or reconsideration of, inter alia, articles 3 (Seat of the Court), 4 (Status and legal capacity), 6 (Qualification and election of judges) and 19 (Rules of the Court).

(6) Despite this disagreement at the level of technique, all agreed that the Court could only operate effectively if brought into a close relationship with the United Nations, both for administrative purposes, in order to enhance its universality, authority and permanence, and because in part the exercise of the Court's jurisdiction could be consequential upon decisions by the

Security Council: see article 23. The issue of budgetary obligations will also need to be resolved.

(7) Some of the links with the United Nations are provided for in the draft Statute. Other important questions (e.g. budgetary arrangements) will need to be worked out as part of the process of adoption of a Statute. The Commission has not sought to elaborate the latter group of questions, which can only satisfactorily be worked out in the context of an overall willingness of States to proceed to the establishment of a Court. See the note on covering clauses at the end of the commentary and see further Appendix II for a review of the various options for relating an entity such as the Court to the United Nations.

Article 3: Seat of the Court

Commentary

(1) An agreement will need to be entered into on behalf of the Court with the State which agrees to act as its host. This agreement should be formally entered into by the President acting with the prior approval of the States parties.

(2) It is envisaged that the State in whose territory the Court is to be located should also provide prison facilities for the detention of persons convicted under the Statute, in the absence of other arrangements under article 59. This is without prejudice to the question of meeting the costs of detention, for which provision will need to be made.

(3) Although trials will be held in the seat of the Court, unless otherwise decided (see art. 32), other powers and functions of the Court and its various organs may have to be exercised elsewhere, whether in the territory of States parties pursuant to cooperation arrangements with the Court (cf. art. 51), even in the territory of States not parties to the Statute, by special arrangement (see art. 56).

Article 4: Status and legal capacity

Commentary

(1) Paragraph 1 of article 4 reflects the goals of flexibility and cost-reduction set out in the report of the Working Group in 1992 which laid down the basic parameters for the draft Statute. While the Court is a permanent institution, it shall sit only when required to consider a case submitted to it.

Some members continued to feel that this was incompatible with the necessary permanence, stability and independence of a true international criminal court.

(2) The Court is intended to benefit in the territory of each State party from such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

PART 2: COMPOSITION AND ADMINISTRATION OF THE COURT

Article 5: Organs of the Court

Commentary

(1) Article 5 specifies the structure of the international judicial system to be created and its component parts. Strictly judicial functions are to be performed by the Presidency (as to which see art. 8), and various chambers (see art. 9). The crucial function of the investigation and prosecution of offenders is to be performed by an independent organ, the Procuracy (see art. 12). The principal administrative organ of the Court is the Registry (see art. 13). For conceptual, logistical and other reasons, the three organs are to be considered as constituting an international judicial system as a whole, notwithstanding the necessary independence which has to exist, for ethical and fair trial reasons, between the judicial organ and the prosecutor.

(2) Care has been taken throughout the Statute to refer, as the case may be, to the Court as a whole, or to particular organs intended to perform particular functions. So far as judicial functions are concerned, in the pre-trial phase these are largely of a preliminary or procedural character and are entrusted to the Presidency (cf. art. 8 (4)). Once a Trial Chamber or the Appeals Chamber is seized of a case, that Chamber will exercise the various powers and functions attributed to the Court as a whole (see arts. 38 (5) and 49 (1)).

Article 6: Qualification and election of judges

Commentary

(1) Article 6 lays down the basic requirement that judges be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. It also addresses the difficult issue of the balance of qualifications required of the judges as between criminal law and criminal trial experience (the importance of which was stressed in many comments by States and during the Sixth Committee debate) and expertise in the field of international law.

(2) In order to strike an appropriate balance between these two needs, article 6 provides for separate elections of persons nominated with qualifications in criminal law and procedure or international law. The requirement of criminal trial experience is understood to include experience as judge, prosecutor or advocate in criminal cases. The requirement of recognized competence in international law may be met by competence in international humanitarian law and international human rights law. Three of the 10 judges elected from nominees with criminal trial experience will serve on each Trial Chamber: see article 9 (5). The eight judges elected from nominees with recognized competence in international law will ensure the degree of competence in international law which the Court will undoubtedly need. This does not exclude the possibility of persons being nominated with both criminal trial experience and recognized competence in international law. In such cases, it will be a matter for the nominating States to specify whether a person is nominated as having criminal trial experience or recognized competence in international law.

(3) Elections will be by absolute majority of the States parties: thus a nominee must obtain votes of 50 per cent plus one of the total number of States parties in order to be elected. Successive votes may have to be taken before that majority can be obtained.

(4) The 1993 draft provided a relatively long period of 12 years for the term of office of the judges. This was criticized by some States as too long, and has been reduced to nine years, the same term as judges of the International Court of Justice. By contrast the Working Group reaffirmed its view that judges should not be eligible for re-election. The special nature of an international criminal jurisdiction militates in favour of that principle, even on the basis of a nine year term. However, it is necessary to provide limited exceptions to this principle to cope with transitional cases and casual vacancies (see arts. 6 (7) and 7 (2)).

(5) Some members believed that the distinction drawn by article 6 between persons with criminal trial experience and recognized competence, in international law was too rigid and categorical. In their view it would be sufficient to require persons nominated for election to have either or both of those qualifications and to leave the issues of the balance of qualifications of the judges to the good sense of the States parties.

Article 7: Judicial vacancies

Commentary

(1) Vacancies in judicial office may be caused by death, by resignation or, in accordance with article 15, by loss of office. Replacement judges are to be elected in accordance with article 6 for the balance of their predecessor's term. If that term is less than five years measured from the day of taking up office, they are eligible for re-election.

(2) In accordance with article 6 (8), a replacement judge should have similar qualifications to the judge's predecessor. Thus, for example, a judge elected from nominees with criminal trial experience will be replaced by another such judge, in order to maintain the overall balance of the Court.

Article 8: The Presidency

Commentary

(1) The President and the two Vice-Presidents (with two alternates) have to perform important functions in the administration of the Court, in particular as members of the Presidency. They are elected for a term of three years, to coincide with new elections for one third of the judges. After each triennium the Presidency and the Appeals Chamber will be reconstituted: see article 8 (2). Alternates to the Vice-Presidents will also be elected to ensure that there are always three persons available to constitute the Presidency.

(2) Some members of the Working Group argued strongly that the Court should have a full-time President, who would reside at the seat of the Court and be responsible under the Statute for its judicial functioning. Others stressed the need for flexibility, and the character of the Court as a body which would only be convened as necessary: in their view a requirement that the President be full time might unnecessarily restrict the range of candidates for the position. It was agreed that the provision would not prevent the President from becoming full time if circumstances should so require.

(3) In addition to its overall responsibility for administration, the Presidency has pre- and post-trial functions of a judicial character under the Statute. The manner in which these functions are exercised will be subject to more detailed regulation in the Rules.

(4) In the case of some of the pre-trial functions, the Presidency may delegate them to a judge or judges under paragraph 5. This raises the question whether the involvement of any one judge in a case might prevent that judge sitting as a member of a Trial or Appeals Chamber, on the basis of an appearance of lack of impartiality.

(5) The European Court of Human Rights has had to face the problem on a number of occasions of whether prior involvement in a particular case

disqualifies a judge from hearing the case under article 6 (1) of the European Convention, on Human Rights and Fundamental Freedoms which entitled an accused to a hearing "by an impartial tribunal" [(cf. art. 14 (1) of the International Covenant on Civil and Political Rights of 1966 (hereafter referred to as "ICCPR"))]. The European Court of Human Rights has held that "the mere fact that a judge has already taken decisions about the trial cannot in itself be regarded as justifying anxieties about his impartiality. What matters is the scope and nature of the measures taken by the judge ..." (Saraiva de Carvalho v. Portugal ECHR Ser. A vol. 286-B (1994) at para. 35; Nortier v. Netherlands ECHR Ser. A vol. 267 (1983), referring to the earlier cases). Thus a judge who had to determine on the basis of the file whether a case, including the prosecutor's charges, amounted to a prima facie case such as to justify making the accused go through the ordeal of a trial did not infringe article 6 (1) of the Convention by subsequently sitting at the trial, since the issues to be decided were not the same as those at the trial and there was no pre-judgment of guilt (id. at para. 37). Similarly with a decision to leave an accused in pre-trial detention, which was a decision not "capable of having a decisive influence on [the judge's] opinion of the merits" (id. at para. 38). The position is different where the judge is required to form a provisional view about the actual guilt of the accused: see Hauschildt v. Denmark Ser. A Vol. 154 (1989) ("particularly confirmed suspicion").

(6) In the exercise of its functions under the Statute and in particular of its power of delegation under paragraph 5, the Presidency will need to take these principles carefully into account. However, in the Working Group's view the functions actually conferred by the Statute in the pre-trial phase are consistent with the involvement of members of the Presidency in Chambers subsequently dealing with that case. The one exception is the Indictment Chamber which may hear evidence in the absence of the accused. See the commentary to article 37 (5) below.

Article 9: Chambers

Commentary

(1) In order to allow for specialization, an Appeals Chamber is to be established, consisting of the President and six judges, at least three of whom are to be drawn from judges nominated as having recognized competence in international law. This ensures that a majority of judges with criminal trial experience will be available to serve on Trial Chambers. If the President is not

available to preside over the Appeals Chamber, a Vice-President shall do so. See article 8 (2).

(2) A relatively strict separation of trial and appellate functions is envisaged. But for practical and logistic reasons that separation cannot be complete. For example, the other judges may have to act as members of the Appeals Chamber if a member of that Chamber is unavailable or disqualified: see article 9 (4).

(3) In long trials, problems can arise if one or more members of the Court become unavailable (e.g. through ill-health). Paragraph 6 allows for alternate judges to be nominated to attend a trial and to replace judges who become unavailable. The purpose of alternate judges is to ensure that five judges should be available at the end of a trial to decide on the case and the sentence. In particular, it is important to avoid the possibility of a divided Chamber of four judges, leading to the possibility of a retrial: cf. article 45 (3).

(4) It was agreed that the importance of maintaining impartiality dictated that a judge having the nationality of a complainant State or of the State of which the accused is a national should not be a member of a chamber dealing with that case. See paragraph 7.

(5) The modalities of constituting a Trial Chamber will be laid down in the Rules. As to their content on this point, some members believed that it would be appropriate for the Presidency to appoint the judges who would serve in a Chamber. Others believed that the membership of the Chambers should be predetermined on an annual basis and should follow the principle of rotation to ensure that all judges have the opportunity to participate in the work of the Court. On balance the Working Group thought this was a matter which could be left to the Rules, taking into account experience in the working of the Statute. It was noted that a number of Trial Chambers could be constituted at a given time, although due to the limited number of judges available it would only be possible for two trial Chambers actually to sit at the same time.

Article 10: Independence of judges

Commentary

(1) Article 10 states the basic rule of the independence of the judges. In drafting it, the Working Group took into account the requirement that judicial independence be effectively ensured and also the fact that the Court will not - or not at first - be a full-time body. Thus, in accordance with article 17, judges are not paid a salary but a daily allowance for each day in which they

perform their functions. Article 10, without ruling out the possibility that the judge may perform other salaried functions (as also contemplated in art. 17 (3)), endeavours to define the activities which might compromise the independence of the judges and which are accordingly precluded.

(2) For instance, it was clearly understood that a judge could not be, at the same time, a member of the legislative or executive branch of a national government. The reference to the executive branch is not intended to cover persons who do not perform ordinary executive functions of government but have an independent role or office. Similarly, a judge should not at the same time be engaged in the investigation or prosecution of crime at the national level. On the other hand, national judges with experience in presiding over criminal trials would be most appropriate persons to act as judges.

(3) Some members of the Working Group would strongly prefer a permanent court, believing that only permanence will give full assurance of independence and impartiality. Other members accept that the workload of the Court might become such that full-time judges will be required. In such a case, paragraph 4 provides that, on the recommendation of the Presidency, the States parties by a two-thirds majority may decide that the judges should serve on a full-time basis. In that case, existing judges may elect to serve on a full-time basis. Judges subsequently elected will necessarily do so. In such cases, judges must not hold any other office or employment. See also article 17 (4).

Article 11: Excusing and disqualification of judges

Commentary

(1) The Presidency may, at the request of any judge, excuse that judge from the exercise of a function under this Statute and may do so without giving any reason. Judges have a general obligation to be available to sit on the Court (see art. 6 (2)), but circumstances might arise where it is necessary for good reason to excuse a judge from sitting and where the interests of justice will not be served by disclosing the reason. This might be so in the case of grave security risks to the person or family of a judge. These matters are left to the good sense of the Presidency and the judge concerned.

(2) In addition, a judge who has previously been involved in a case in any capacity or whose impartiality might reasonably be doubted is disqualified from sitting. The words "in any case in which they have previously been involved in any capacity" are intended to cover, for example, the judge's

participation in the same case as prosecutor or defence lawyer. An issue of disqualification, if not dealt with under paragraph 1, may be raised by the Prosecutor or the accused. The decision rests with the Chamber concerned.

Article 12: The Procuracy

Commentary

(1) Articles 12 and 13 deal with the two other organs which compose the international judicial system to be established.

(2) The Procuracy is an independent organ composed of the Prosecutor, one or more Deputy Prosecutors and such other qualified staff as may be required. The importance of the independence of the Procuracy is underlined by the provision that the election of the Prosecutor and Deputy Prosecutors be carried out not by the Court but by an absolute majority of the States parties. The Prosecutor must not seek or receive instructions from any Government or any other source, but acts as a representative of the international community as a whole.

(3) Paragraph 4 allows the Prosecutor or a Deputy Prosecutor to be elected on a stand-by basis, that is to say, that they would be available to act as required, rather than on a full-time basis. Like article 10, it is intended to maintain the flexibility of the system of the Statute, while allowing for full-time involvement of the Prosecutor in case of need.

(4) As with the judges, the Prosecutor or Deputy Prosecutor cannot act as such in relation to a complaint involving a person of the same nationality.

(5) Paragraph 6 allows the Presidency to excuse the Prosecutor or a Deputy Prosecutor at their request from acting in a given case: in this regard it parallels article 11 (1). It also provides for the Presidency to decide any issue that might arise as to the disqualification of the Prosecutor or a Deputy Prosecutor, whether under paragraph 5 or otherwise. Such cases are likely to be rare, since the Prosecutor acts in an essentially adversarial role and is not subject to the same requirement of independence as are the judges under article 10. Indeed, some members of the Working Group thought that this provision was unnecessary and in conflict with the internal independence of the Procuracy from the judges. A majority of the Working Group, however, felt it should be retained to deal with any difficulties that might arise.

(6) An earlier version of this article provided for consultation with the Presidency in connection with the appointment by the Prosecutor of the staff of

the Procuracy. This was deleted because the Working Group felt that it might compromise or be seen to compromise the Prosecutor's independence.

Article 13: The Registry

Commentary

(1) The Registrar, who is elected by the Court, is the principal administrative officer of the Court and is eligible for re-election. The Registrar has important functions under the Statute as a depositary of notifications and a channel for communications with States. A Deputy Registrar may also be elected if required.

(2) Article 13 regulates not only the election of the Registrar but also the appointment of the Registry staff and the rules which apply to the latter. As with article 12, financial arrangements will have to be made in connection with the adoption of the Statute.

Article 14: Solemn undertaking

Commentary

This undertaking is to be made by the judges but also by the other officers of the Court, that is to say, the Prosecutor and Deputy Prosecutors, the Registrar and the Deputy Registrar.

Article 15: Loss of office

Commentary

(1) Article 15 deals both with loss of office by reason of misconduct or serious breach of the Statute and by reason of illness or disability. It applies equally to the judges and other officers. In the case of the Prosecutor or a Deputy Prosecutor, removal is a matter for a majority of States parties, again emphasizing the importance attached to the independence of the Procuracy.

(2) It is envisaged that procedures ensuring due process to the judge or officer in question should be established in the Rules.

(3) Some members observed that this provision differed from the corresponding article of the Statute of the International Court of Justice (art. 18) which required the unanimous opinion of the other members of the Court that the judge had ceased to fulfil the necessary conditions. The prevailing view was that a two-thirds majority was a sufficient guarantee, and that a requirement of unanimity was too stringent.

Article 16: Privileges and immunities

Commentary

(1) Article 16 refers to the privileges, immunities and facilities to be extended to judges, officers and staff of the Court as well as to counsel, experts and witnesses appearing before it. It may be compared with article 19 of the Statute of the International Court of Justice and article 30 of the Statute of the International Tribunal for the Former Yugoslavia. In the case of the judges, the Prosecutor, the Deputy Prosecutors and staff of the Procuracy, and the Registrar and Deputy Registrar, the need for free exercise of their functions is very great, and they are expressly given the privileges, immunities and facilities of a diplomatic agent. Reference is made here to the Vienna Convention on Diplomatic Relations of 16 April 1961 as that Convention contains the most widely accepted and elaborated rules on the subject.

(2) The position of the Registry staff is governed by the principle of functional immunity. It can be expected that much of their work will be done at the seat of the Court. The issue of facilities there will need to be regulated in the agreement with the host State under article 3 (2).

(3) Counsel, experts and witnesses are given the same privileges, immunities and facilities as those accorded to counsel, experts and witnesses involved in proceedings before the International Court of Justice under article 42 (3) of the Statute of the International Court of Justice.

(4) There is provision for waiver of an immunity by the judges, but this does not apply to acts or omissions of a judge, the Prosecutor or Registrar as such, that is to say, while acting in the performance of their office. The Prosecutor and the Registrar must consent to any waiver affecting their respective staff.

Article 17: Allowances and expenses

Commentary

(1) Article 17 reflects the fact that, while the Court will not be a full-time body, its President, as explained in the commentary to article 8, should be available on a day-to-day basis if required. Hence the distinction between the daily or special allowance proposed for the judges and the Vice-Presidents and the annual allowance proposed for the President.

(2) As noted in the commentary to article 10, it can subsequently be decided by States parties, having regard to its workload, that the Court should move to a full-time basis. Paragraph 4 provides for the payment of full-time salaries instead of an allowance in such cases.

Article 18: Working languages

Commentary

English and French are to be the working languages of the Court. But this is without prejudice to the possibility that a particular trial be conducted concurrently in the language of the accused and of the witnesses, together with the working languages. Cf. article 41 (1) (f).

Article 19: Rules of the Court

Commentary

(1) Article 19 refers to rules of the Court relating to pre-trial investigations as well as the conduct of the trial itself. It extends to matters concerning the respect of the rights of the accused, procedure, evidence, etc.

(2) In connection with paragraph 1 (b), one member felt that the adoption of rules of evidence was too complex and might involve the enactment of substantive law. It should in principle not be part of the Court's competence. Other members believed that it would be cumbersome and inflexible to contain all the rules of procedure and evidence in the Statute itself, and that this was a matter which should be left to the judges, acting with the approval of the States parties.

(3) In order to involve States parties more closely in the formulation of the Rules, article 19 envisages that the first set of Rules will be drawn up by the judges but adopted by States parties themselves in conference. Thereafter, in order to preserve flexibility, the judges may initiate changes in the Rules but these must only have definitive effect if approved by States parties, either at a meeting of States parties or by a special procedure of notification under paragraph 3. It is envisaged that this special summary procedure would be used for minor amendments, in particular changes not raising issues of general principle. Pending their approval by the States parties under either procedure, the Rules could be given provisional effect.

PART 3: JURISDICTION OF THE COURT

Development and structure of Part 3

(1) Part 3, dealing with jurisdiction, is central to the draft Statute. Read in conjunction with certain provisions in Parts 3 and 5 (in particular arts. 34, 35 and 37), it limits the range of cases which the Court may deal with, so as to restrict the operation of the Statute to the situations and purposes referred to in the preamble.

(2) Two basic ideas initially underlay the jurisdictional strategy envisaged for the Statute, and were expressed in the 1992 Working Group's Report. The first was that the Court should exercise jurisdiction over crimes of an international character defined by existing treaties, and that - as a corollary - the Statute

itself would be primarily procedural and adjectival. The second was that the Statute should distinguish, as the Statute of the International Court of Justice does, between participation and support for the structure and operation of the Court on the one hand and acceptance of substantive jurisdiction in a particular case on the other. The process of acceptance would be a separate one (as under art. 36 of the Statute of the International Court of Justice).

(3) To a great extent these premises continue to be reflected in the draft articles. Thus a major strand of jurisdiction continues to be in relation to crimes defined by a list of treaties in force (see art. 20 (e)) and jurisdiction in respect of such crimes is essentially based on the consent of affected State, (this is sometimes referred to as the principle of "ceded jurisdiction"): see below, commentary to article 21. But the two principles have undergone some modification and development.

(4) The first modification relates to crimes under general international law. The distinction between treaty crimes and crimes under general international law can be difficult to draw. The crime of genocide provides an important example: it cannot be doubted that genocide, as defined in the Genocide Convention, is a crime under general international law.

(5) In 1993 a majority of the Working Group concluded that crimes under general international law could not be entirely excluded from the draft Statute. Consequently the Court was given jurisdiction over such crimes generically. They were defined as crimes "under a norm of international law accepted and recognized by the international community of States as a whole as being of such a fundamental character that its violation attracts the criminal responsibility of individuals". Jurisdiction was limited by requirements of acceptance by the States on whose territory the alleged crime was committed and on whose territory the suspect was present. But this provision met with considerable criticism in the Sixth Committee and in the comments of States, on the grounds that a mere reference to crimes under general international law was highly uncertain and that it would give excessive power to the proposed Court to deal with conduct on the basis that it constituted a crime under general international law.

(6) The Working Group accepts that there is some point to these criticisms, and that in the context of a new and untried jurisdictional system, provisions of indeterminate reference should be avoided. It has therefore limited the Court's jurisdiction over crimes under general international law to a number of specified cases, without prejudice to the definition and content of such crimes for other purposes. See the commentary to article 20 (a) to (d).

(7) The second modification relates to the extent of any "inherent" jurisdiction (compétence propre") of the Court. One case of a crime under general international law that cries out for inclusion is the crime of genocide, authoritatively defined in the Genocide Convention of 1948. In the Working Group's view, the prohibition of genocide is of such fundamental significance, and the occasions for legitimate doubt or dispute over whether a given situation amounts to genocide are so limited, that the Court ought, exceptionally, to have inherent jurisdiction over it by virtue solely of the States participating in the Statute, without any further requirement of consent or acceptance by any particular State. The Statute so provides. The case for considering such "inherent jurisdiction" is powerfully reinforced by the Genocide Convention itself, which does not confer jurisdiction over genocide on other States on an aut dedere aut judicare basis, but expressly contemplates its conferral on an international criminal court to be created (article VI). The draft Statute can thus be seen as completing in this respect the scheme for the prevention and punishment of genocide begun in 1948 - and at a time when stronger measures against those who commit genocide are called for.

(8) A number of other important changes are reflected in Part 3 of the draft Statute. The 1993 draft distinguished between two "strands" of jurisdiction in relation to treaty crimes: (a) jurisdiction over crimes of an international character (1993 Statute, art. 22) and (b) crimes under what were referred to as suppression conventions (1993 Statute, art. 26 (2)). As the 1993 Report pointed out, a distinction could be drawn "between treaties which define crimes as international crimes and treaties which merely provide for the suppression of undesirable conduct constituting crimes under national law" (1993 Report, p. 281, para (5)). Although the distinction reflects, grosso modo, a distinction between conduct specifically defined as a crime independently of any given system of national law and conduct which a treaty requires to be made criminally punishable under national law, it can be difficult to draw in the context of some of the treaties listed in the 1993 draft Statute, and its retention would add an additional level of complexity. For these reasons the distinction has been abandoned: see article 20 (e) and the list of treaty crimes in the Annex. This does not suggest that all of the crimes referred to in the Annex are of the same character, which is certainly not the case.

(9) But this has presented a further problem. Another characteristic of "suppression conventions" (e.g. the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988, which

is by far the most important example of the category) is that they cover a wide range of conduct, much of which, taken in isolation in the context of a single prosecution for a breach, is not of any substantial international concern. If the Court's jurisdiction is to be appropriately limited, either the treaties in question would have to be excluded altogether (which in the case of the 1988 Convention would be undesirable) or other jurisdiction-limiting provisions need to be devised.

(10) The draft Statute as now adopted takes the second course. The Annex to the Statute lists multilateral treaties in force clearly defining as criminal specified conduct of international concern and extending the jurisdiction of States over such conduct. The Court's jurisdiction extends to certain crimes defined by those treaties, whether or not they are "suppression conventions" as earlier defined. At the same time, in addition to requiring acceptance of the Court's jurisdiction in respect of such crimes by relevant States (art. 20 (e)), the Statute seeks to limit the exercise of the Court's jurisdiction by provisions giving effect to the policies set out in the preamble. Relevant provisions in this respect are:

- Article 20 (e) (the Court has jurisdiction over the treaty crimes only in cases which "having regard to the conduct alleged, constitute exceptionally serious crimes of international concern"; it will be a preliminary question under art. 34 for the Court to determine whether this is so in any case);
- Article 25 (a complaint must be lodged by a State which has accepted the Court's jurisdiction with respect to the crime);
- Article 27 (the Presidency must determine whether the Court should deal with the matter having regard to art. 35);
- Article 34 (jurisdictional challenges may be made by the accused or an interested State at an early stage);
- Article 35 (the Court may be called on to decide whether, having regard to specific criteria, related to the purposes of the Statute a given case should be regarded as admissible);

(11) It is thus by the combination of a defined jurisdiction, clear requirements of acceptance of that jurisdiction and principled controls on the exercise of jurisdiction that the Statute seeks to ensure, in the words of the preamble, that the Court will be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective.

(12) This having been said, some members of the Working Group expressed their dissatisfaction at the restrictive approach taken to the jurisdiction of the Court (other than in cases of genocide). In their view the various restrictions imposed on the Court, and in particular the restrictive requirements of acceptance contained in article 21, were likely to frustrate its operation in many cases, and even to make the quest for an international criminal jurisdiction nugatory.

(13) By contrast, other members of the Working Group thought that the Statute went too far in granting "inherent" jurisdiction even over genocide, and that in the present state of the international community, the Court's jurisdiction should be entirely consensual. This issue arose also with respect to article 23, as recounted in the commentary to that article.

(14) Suggestions were made that the Court should also have an advisory jurisdiction in matters of international criminal law, either on reference from United Nations organs or from individual States. The Working Group has not made any provision for such a jurisdiction. The function of the Court is to try persons charged under the Statute for crimes covered by article 20, including crimes contrary to the treaties referred to in article 20 (e). In doing so it will necessarily have to interpret those treaties, but it does not seem appropriate to give it additional jurisdiction of an inter-State character under them. Many of the treaties have their own jurisdictional provisions, for example referring disputes over their interpretation or application to the International Court of Justice. There is no reason to displace this jurisdiction.

Article 20: Jurisdiction of the Court in respect of specified crimes

Commentary

(1) Article 20 states exhaustively the crimes over which the Court has jurisdiction under the Statute. There are, in effect, two categories of such crimes, those under general international law (subparas. (a) to (d) and those crimes under or pursuant to certain treaties (para. (e) and Annex). The distinction is of particular importance for the purposes of article 39, which contains the nullum crimen sine lege principle.

(2) This in no way suggests that the two categories are mutually exclusive; on the contrary, there is considerable overlap between them. The conditions for the existence and exercise of jurisdiction under paragraphs 1 and 2 are essentially the same (subject to the obvious requirement that the relevant treaty should be properly applicable to the accused, as to which see art. 39). The only exception

is genocide, which is covered exclusively by paragraph (a), and which, as already explained, is subject to its own jurisdictional regime under the Statute.

Certain crimes under general international law

(3) For the reasons stated above, the Working Group concluded that it should not confer jurisdiction by reference to the general category of crimes under international law, but should refer only to the specific crimes warranting inclusion under that category. It has included four such: genocide, aggression, serious violations of the laws and customs applicable in armed conflict and crimes against humanity. It was guided in the choice of these in particular by the fact that three of the four crimes are singled out in the Statute of the International Tribunal for the Former Yugoslavia as crimes under general international law falling within the jurisdiction of the Tribunal (see arts. 3-5 of that Statute). The position of aggression as a crime is different, not least because of the special responsibilities of the Security Council under Chapter VII of the Charter of the United Nations, but the Working Group felt that it too should be included, subject to certain safeguards. The inclusion of these four crimes represented a common core of agreement among the Working Group, and is without prejudice to the identification and application of the concept of crimes under general international law for other purposes.

(4) As noted in the introduction to Part 3, above, the Statute is primarily an adjectival and procedural instrument. It is not its function to define new crimes. Nor, is it the function of the Statute authoritatively to codify crimes under general international law. With respect to certain of these crimes, this is the purpose of the Draft Code of Crimes against the Peace and Security of Mankind, although the Draft Code is not intended to deal with all crimes under general international law. To do so would require a substantial legislative effort. Accordingly the Working Group has listed the four crimes without further specification in paragraphs (a) to (d). The following commentary states the understanding of the Working Group with respect to the four crimes, as a basis for the application of these paragraphs by the Court.

(5) The least problematic of these, without doubt, is genocide. It is clearly and authoritatively defined in the 1948 Convention which is widely ratified, and which envisages that cases of genocide may be referred to an international criminal court. For the reasons stated in the introduction to this Part, the Working Group believes that, exceptionally, the Court should have inherent jurisdiction over the crime of genocide - that is to say, its jurisdiction should exist as between all States parties to the Statute, and it should be able to be

triggered by a complaint brought by any State party to the Genocide Convention, as expressly envisaged in article VI of that Convention.

(6) The crime of aggression presents more difficulty in that there is no treaty definition comparable to genocide. General Assembly resolution 3314 (XXIX) deals with aggression by States, not with the crimes of individuals, and is designed as a guide for the Security Council, not as a definition for judicial use. But, given the provisions of Article 2 (4) of the Charter of the United Nations, that resolution offers some guidance, and a court must, today, be in a better position to define the customary law crime of aggression than was the Nürnberg Tribunal in 1946. It would thus seem retrogressive to exclude individual criminal responsibility for aggression (in particular, acts directly associated with the waging of a war of aggression) 50 years after Nürnberg. On the other hand the difficulties of definition and application, combined with the Security Council's special responsibilities under Chapter VII of the Charter, mean that special provision should be made to ensure that prosecutions are brought for aggression only if the Security Council first determines that the State in question has committed aggression in circumstances involving the crime of aggression which is the subject of the charge (see art. 23 (2) and commentary).

(7) A number of members took the view that not every single act of aggression was a crime under international law giving rise to the criminal responsibility of individuals. In their view the customary rule as it had evolved since 1945 covered only the waging of a war of aggression. They relied in particular on article 6 (a) of the Charter of the International Military Tribunal of 1945 (the Nürnberg Charter). They also drew attention to the language of the Friendly Relations Declaration (General Assembly resolution 2625 (XXV) of 24 October 1970), Principle 1 of which states, inter alia: "A war of aggression constitutes a crime against the peace, for which there is responsibility under international law", and to the terms of article 5 (2) of General Assembly resolution 3314 (XXIX) of 1974, on the Definition of Aggression, which states that "A war of aggression is a crime against international peace. Aggression gives rise to international responsibility." In the view of these members, the language of these resolutions had to be taken into account notwithstanding doubts about whether they dealt with inter-State law or with the criminal responsibility of individuals.

(8) Article 20 (c) refers to serious violations of the laws and customs applicable in armed conflict. This reflects provisions both in the Statute of the International Tribunal for the Former Yugoslavia and in the Draft Code of

Crimes against the Peace and Security of Mankind as adopted at first reading. Article 2 of the Statute of the International Tribunal for the Former Yugoslavia covers grave breaches of the Geneva Conventions of 1949, which were and remain in force on the territory of the former Yugoslavia. But in addition article 3 deals with "violations of the laws or customs of war". It provides as follows:

"Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;

(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) plunder of public or private property."

(9) This may be compared with the relevant provision of the Draft Code of Crimes against the Peace and Security of Mankind. Article 22 of the Draft Code provides as follows:

"Exceptionally serious war crimes

1. An individual who commits or orders the commission of an exceptionally serious war crime shall, on conviction thereof, be sentenced [to ...].

2. For the purposes of this Code, an exceptionally serious war crime is an exceptionally serious violation of principles and rules of international law applicable in armed conflict consisting of any of the following acts:

(a) acts of inhumanity, cruelty or barbarity directed against the life, dignity or physical or mental integrity of persons [, in particular wilful killing, torture, mutilation, biological experiments, taking of hostages, compelling a protected person to serve in the forces of a hostile Power, unjustifiable delay in the repatriation of prisoners of war after the cessation of active hostilities, deportation or transfer of the civilian population and collective punishment];

(b) establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory;

(c) use of unlawful weapons;

(d) employing methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment;

(e) large-scale destruction of civilian property;

(f) wilful attacks on property of exceptional religious, historical or cultural value."

(10) The Working Group shares the widespread view that there exists the category of war crimes under customary international law. That category overlaps with but is not identical to the category of grave breaches of the 1949 Geneva Conventions and Additional Protocol I of 1977. Modern usage prefers to refer to the "rules applicable in armed conflict" rather than the "laws of war", given the uncertainties about the status of "war" since 1945 and the fact that in most armed conflicts even of an obvious international character there is no formal declaration of war. Reference is made here both to "the laws and customs" not only because the phrase is a hallowed one but also to emphasize its basis in customary (general) international law. On the other hand not all breaches of the laws of war will be of sufficient gravity to justify their falling within the jurisdiction of the Court, and paragraph (c) is accordingly limited by the use of the phrase "serious violations". The term "serious violations" is used to avoid confusion with

"grave breaches" which is a technical term in the 1949 Conventions and Additional Protocol I of 1977. It does not follow from the classification of conduct as a "grave breach" made in the 1949 Conventions and the 1977 Protocol that the conduct will also constitute a "serious violation" although of course it may do so.

(11) With respect to the fourth category, crimes against humanity, this is by contrast a term of art, responding to the position under general international law. But there are unresolved issues about the definition of the crime. The view was expressed that the concept of "crimes against humanity" gave rise to the difficult question of determining, at the present stage of development in international law, when such crimes - in the absence of an applicable treaty regime - were triable as international crimes.

(12) An initial formulation of crimes against humanity was provided in article 6 (c) of the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945, although the Nürnberg Tribunal was very circumspect in applying it. The concept was taken up in subsequent texts and is now contained in Article 5 of the Statute of the International Tribunal for the Former Yugoslavia, which reads as follows:

"Crimes against humanity

> The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
>
> (a) murder;
>
> (b) extermination;
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> (c) enslavement;
>
> (d) deportation;
>
> (e) imprisonment;
>
> (f) torture;
>
> (g) rape;
>
> (h) persecutions on political, racial and religious grounds;
>
> (i) other inhumane acts."

(13) This formulation is to be compared with draft article 21 of the Draft Code of Crimes against the Peace and Security of Mankind, which is entitled "Systematic or mass violations of human rights", but which in substance covers the same field as article 5 of the Yugoslav Tribunal Statute. It provides as follows:

"An individual who commits or orders the commission of any of the following violations of human rights:

- murder
- torture
- establishing or maintaining over persons a status of slavery, servitude or forced labour
- persecution on social, political, racial, religious or cultural grounds

in a systematic manner or on a mass scale; or

- deportation or forcible transfer of population

shall, on conviction thereof, be sentenced [to ...]."

(14) It is the understanding of the Working Group that the definition of crimes against humanity encompasses inhumane acts of a very serious character involving widespread or systematic violations aimed at the civilian population in whole or part. The hallmarks of such crimes lie in their large-scale and systematic nature. The particular forms of unlawful act (murder, enslavement, deportation, torture, rape, imprisonment etc.) are less crucial to the definition that the factors of scale and deliberate policy, as well as in their being targeted against the civilian population in whole or in part. This idea is sought to be reflected in the phrase "directed against any civilian population" in article 5 of the Yugoslav Tribunal Statute, but it is more explicitly brought out in article 21 of the Draft Code. The term "directed against any civilian population" should be taken to refer to acts committed as part of a widespread and systematic attack against a civilian population on national, political, ethnic, racial or religious grounds. The particular acts referred to in the definition are acts deliberately committed as part of such an attack.

(15) Some members doubted the wisdom of including in article 20 crimes under general international law. In their view, the primary purpose of the Draft Statute was the setting up of a court to try such crimes as the parties to the Statute could agree were international crimes triable by such a court. The annex to the Statute, which set out such international crimes as had already been defined or identified by multilateral treaties widely adhered to and which were sufficiently clear and precise for a criminal court to apply. States becoming parties to the Statute would agree that, subject to the preconditions in articles 21 and 22, such crimes could be referred to the Court. Two of the four crimes

now listed in article 20 (genocide and serious violations of the laws and customs applicable in armed conflict) were defined in whole or substantial part in multilateral treaties and listing them again as crimes under general international law was unnecessary. Also such a listing raised the difficult question as to when multilateral treaty norms pass into customary international law. As to the two other crimes listed (aggression and crimes against humanity), serious questions as to their definition arose, which the Statute as a procedural and adjectival instrument could not address. Moreover, any listing of crimes under general international law raised questions as to why other international crimes, such as apartheid and terrorism, were not also included.

(16) These and other members of the Working Group also argued that, if any crimes under general international law were to be included in the jurisdiction of the Court, the crime of apartheid should be among them. They pointed to the widespread ratification of the Apartheid Convention, to the even more widespread condemnation of the practice of apartheid as a crime, and to the need to guard against further outbreaks of the crime whether in Southern Africa or elsewhere. Other members of the Working Group pointed out that apartheid was included in the list of treaty crimes in paragraph (e) of article 20, that the reference in that Convention to apartheid "as practised in southern Africa" was now factually inaccurate, and that quite apart from the broad definition of the crime in the Convention, its status as a crime under international law remained a disputed issue. On balance the Working Group agreed that in the present international circumstances and given the advent of majority rule in South Africa, it was sufficient to include the Apartheid Convention under paragraph (e) of article 20.

(17) In this context, it should be stressed again that article 20 (a)-(d) is not intended as an exhaustive list of crimes under general international law. It is limited to those crimes under general international law which the Commission believes should be within the jurisdiction of the Court at this stage, whether by reason of their magnitude, the continuing reality of their occurrence or their inevitable international consequences.

Crimes of international concern defined by treaties

(18) The bulk of the Court's jurisdiction relates to what may be termed treaty crimes, that is to say, crimes of international concern defined by treaties. In the interests of certainty the Working Group believes that these treaties should be exhaustively enumerated, and this was done in article 22 of the 1993 draft Statute. The list of crimes defined by treaties, revised and with the addition

of the few universal "suppression conventions", is contained in an Annex to the Statute. The criteria for inclusion in the Annex were, to summarize:

(a) that the crimes are themselves defined by the treaty so that an international criminal court could apply that treaty as law in relation to the crime, subject to the nullum crimen guarantee contained in article 39;

(b) that the treaty created either a system of universal jurisdiction based on the principle aut dedere aut judicare or the possibility for an international criminal court to try the crime, or both, thus recognizing clearly the principle of international concern.

(19) The Commentary to the Annex gives reasons for the inclusion or exclusion of particular treaties.

(20) In addition the Working Group concluded that some further limitation was required over the Court's jurisdiction under the treaties in the Annex, on the ground that many of those treaties could cover conduct which, though serious in itself, was within the competence of national courts to deal with and which (in the context of an individual case) did not require elevation to the level of an international jurisdiction. This further limitation is achieved by paragraph (e), which requires that the crime in question, having regard to the conduct alleged, should have constituted an exceptionally serious crime of international concern.

(21) The importance of the systematic factor was stressed by a number of members of the Working Group, in particular in the context of crimes associated with terrorist activity. As yet the international community has not developed a single definition of terrorism, although there are definitions of the term in some regional conventions. A systematic campaign of terror committed by some group against the civilian population would fall within the category of crimes under general international law in paragraph (d), and if motivated on ethnic or racial grounds also paragraph (a). In addition, of the 14 treaties listed in the Annex, six are specifically concerned with terrorist offences of one kind or another (e.g. hijacking and hostage-taking). Thus, as a number of members of the Working Group stressed, terrorism, when systematic and sustained, is a crime of international concern covered by one or other of the crimes listed in article 20. In addition, they noted that terrorism practised in any form is universally accepted to be a criminal act.

(22) In many cases terrorist activity is supported by large scale drug-trafficking, which is of undeniable international concern. In such cases, as with those referred to in the previous paragraph, the requirements of

paragraph 2 in terms of the exceptionally serious character of the crime will readily be satisfied.

(23) As is pointed out above, the Annex includes only treaties in force defining crimes of an international character and establishing a broad jurisdictional basis to trial of such crimes. It does not include a number of relevant instruments in the course of development: in particular, the draft Code of Crimes against the Peace and Security of Mankind, and the proposed instrument being elaborated within the framework of the General Assembly on the protection of peace-keepers. As to the draft Code of Crimes, a number of members of the Working Group reaffirmed their view that the draft Code was an essential complement to the draft Statute and their hope that the two instruments would come to be linked in their operation.

Article 21: Preconditions to the exercise of jurisdiction in a given case

Commentary

(1) Article 21 spells out the States which have to accept the Court's jurisdiction with regard to a crime referred to in article 20 for the Court to have jurisdiction. The modes of acceptance are spelt out in article 22.

(2) The general criterion recommended by the Working Group is that contained in article 21 (1) (b). Acceptance is required by any State which has custody of the accused in respect of the crime (which it might have either because it has jurisdiction over the crime or because it has received an extradition request relating to it), and by the State on whose territory the crime was committed. This paragraph should be read in conjunction with article 53 on surrender of an accused to the Court, in particular paragraph 2, and against the background of the strong presumption under article 37 that the Court will have the accused before it when it tries a case.

(3) Article 21 differs from the equivalent provision of the 1993 draft Statute (viz. art. 24) in a number of respects. First, it focuses specifically on the custodial State in respect of the accused, as distinct from any State having jurisdiction under the relevant treaty. Secondly, it requires acceptance by the State on whose territory the crime was committed, thus adopting the acceptance requirement in the 1993 Draft Statute for crimes under general international law. Thirdly, it also requires the acceptance of a State which has already established, or eventually establishes, its right to the extradition of the accused pursuant to an extradition request: see paragraph 2.

(4) Another important feature of the Statute is article 54, which imposes on a State party whose acceptance of the Court's jurisdiction is required, but which

does not accept the jurisdiction, an aut dedere aut judicare obligation, equivalent to the obligation included in most of the treaties listed in the Annex. As between parties to the Statute this in effect integrates the International Criminal Court into the existing system of international criminal jurisdiction and cooperation in respect of treaty crimes. (See below, art. 54 and commentary.)

(5) Several members of the Working Group would have preferred article 21 (1) (b) to have required acceptance by the State of the accused's nationality, as well as or instead of the State on whose territory the crime was committed. In their view the location of the crime could be fortuitous and might even be difficult to determine, whereas nationality represented a determinate and significant link for the purposes of allegiance and jurisdiction. Some would also have preferred an express requirement for consent by the State which was also the victim of the act in question. (See also the commentary to art. 23, para. (9)).

(6) In light of the decision to confer "inherent" jurisdiction over genocide, article 21 treats that crime separately. Genocide is a crime under international law defined by the Genocide Convention (United Nations, Treaty Series, vol. 78, p. 277). Unlike the treaties listed in the Annex, the Genocide Convention is not based on the principle aut dedere aut judicare, but on the principle of territoriality. Article VI provides that persons charged with genocide or any of the other acts enumerated in the Convention shall be tried by a competent court of the State in which the act was committed. However, as a counterpart to the non-inclusion of the principle of universality in the Convention, article VI also provides for the trial of persons by "such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction". This can be read as an authority by States parties to the Convention which are also parties to the Statute to allow the Court to exercise jurisdiction over an accused who has been transferred to the Court by any State. The travaux of article VI support that interpretation. (See Report of the Ad Hoc Committee on Genocide, 5 April - 10 May 1948 (ECOSOC Official Record third year, seventh session, Supp. No. 6 (E/794, 1948) at pp. 11-12)). For the reasons already given, the Working Group concluded that the Court should have inherent jurisdiction over the crime of genocide, on a complaint being made by a party to the Genocide Convention, and the Statute so provides: see paragraph 1 (a), and see also article 25 (1), 51 (3) (a) and 53 (2) (a) (i).

Article 22: Acceptance of the jurisdiction of the Court for the purposes of article 21

Commentary

(1) Article 21 identifies the States whose acceptance of the jurisdiction is required before the Court entertains a case. Article 22 is concerned with the modalities of that acceptance, and is drafted so as to facilitate acceptance both of the Statute as a whole and of the Court's jurisdiction in individual cases.

(2) The system adopted can be characterized as an "opting-in" system, whereby jurisdiction over certain crimes is not conferred automatically on the Court by the sole fact of becoming a party to the Statute but, in addition, by way of a special declaration, which can be made at the time of becoming a party to the Statute or subsequently. The Working Group believed that this best reflected the considerations set out in the preamble, as well as its general approach to the Court's jurisdiction.

(3) In its 1993 Report, the Working Group had proposed two alternatives to this article, based on the idea of "opting out" rather than "opting in" to the jurisdiction. On balance it considers that the "opting in" approach is the right one. Any other approach could prevent the Court hearing a case, even though all States concerned are willing that it should do so. The reason is that it may not be clear, until after a complaint is brought, which specific States are required by article 21 to have accepted the jurisdiction of the Court. If an opting-out regime were to be preferred, its effect would be to prevent a State from accepting jurisdiction in respect of a complaint which had already been brought. This would be undesirable. No doubt it would be possible to add to an initial "opting-out" provision a further capacity to opt back in, but this would be an artificial and complex system, and would, in practice, in the Working Group's view add nothing in substance to article 22 as drafted.

(4) Consistently with this approach, paragraphs 1 to 3 deal with acceptance by State parties to the Statute. Paragraph 1 provides for the possibility of a general declaration along the lines of the optional clause contained in article 36 of the Statute of the International Court of Justice. Such a declaration may be general or subject to limitations ratione materiae or ratione temporis, and may be made for a limited period. It may be given in relation to a single case.

(5) Paragraph 4 deals with the acceptance of the Court's jurisdiction by States which are not parties to the Statute. This should be possible, consistently with the general approach to the Court's jurisdiction outlined in the preamble. On

the other hand a State non-party should not be required - or for that matter permitted - to do more than consent to the exercise of jurisdiction in a given case by declaration lodged with the Registrar. If it wishes to take advantage of the existence of the Court to accept its jurisdiction over crimes, bring complaints, etc., such a State should become a party to the Statute. For judicial cooperation with States not parties see article 56.

(6) A number of members of the Working Group would, however, prefer a system which would actively encourage States to accept the jurisdiction of the Court in advance of any particular crime being committed. They accordingly favour a system of opting-out, so that States on becoming parties to the Statute would have to publicly declare that they did not accept jurisdiction over specified crimes.

(7) When States conclude a treaty by which they accept the jurisdiction of the Court in relation to crimes listed in article 20, they are free to deposit that treaty with the Registrar, and this will constitute a sufficient declaration for the purposes of this article, provided that it is clear that all the parties to the treaty have consented to the deposit. Some members of the Working Group would have preferred to make this clear beyond doubt by adding a paragraph specifically dealing with reference of crimes to the Court by treaty.

Article 23. Action by the Security Council

Commentary

(1) Article 23 (1) does not constitute a separate strand of jurisdiction from the point of view of the kind of crimes which the Court may deal with (jurisdiction ratione materiae). Rather, it allows the Security Council, for example, in circumstances where it might have authority to establish an ad hoc tribunal under Chapter VII of the Charter of the United Nations, instead to have recourse to the Court's jurisdiction by dispensing with the requirement of the acceptance by a State of the jurisdiction of the Court under article 21, and of the lodging of a complaint under article 25. The Working Group felt that such a provision was necessary in order to enable the Security Council to make use of the Court, as an alternative to establishing ad hoc tribunals and as a response to crimes which affront the conscience of mankind. On the other hand it did not intend in any way to add to or increase the powers of the Council as defined in the Charter, as distinct from making available to it the jurisdiction mechanism created by the Statute.

(2) The Working Group understood that the Security Council would not normally refer to the Court a "case" in the sense of an allegation against named individuals. Article 23 (1) envisages that the Security Council would refer to the Court a "matter", that is to say, a situation to which Chapter VII of the Charter applies. It would then be the responsibility of the Prosecutor to determine which individuals should be charged with crimes referred to in article 20 in relation to that matter: see article 25 (4).

(3) Some members expressed concern at the possibility of the Security Council referring a particular case to the Court in any circumstances at all. Quite apart from the question of the extent of the powers of the Security Council under Chapter VII (as to which see para. (1) below), they were concerned that article 23 (1) might be read as endorsing detailed involvement by the Security Council in the prosecution of individuals for crimes, something which in their view should never be a matter for the Council.

(4) Concern was also expressed by some members at the linkage between the Security Council as a principal organ of the United Nations and a treaty body established by a certain number of States. On the other hand it was pointed out that institutional links existed between the United Nations and a number of other such bodies (e.g. the Human Rights Committee under the ICCPR), and that, in any event, the Statute should require the participation of a significant proportion of States before coming into force.

(5) Some members were of the view that the power to refer cases to the Court under article 23 (1) should also be conferred on the General Assembly, particularly in cases in which the Council might be hampered in its actions by the veto. On further consideration, however, it was felt that such a provision should not be included as the General Assembly lacked authority under the Charter to affect directly the rights of States against their will, especially in respect of issues of criminal jurisdiction. The General Assembly would of course retain its power under the Charter to make recommendations with respect to matters falling within the jurisdiction of the Court, and depending on the terms of any relationship agreement under article 2, will have a significant role in the operation of the Statute.

(6) In adopting article 23 (1) the Working Group is not to be understood as taking any position as to the extent of the powers of the Security Council under

Chapter VII of the Charter or otherwise, or as to the situations in which it is proper that these powers should be exercised. Different views were expressed on these issues during the debate.

(7) As noted in the commentary to article 2, the financial arrangements for the Court will depend on the relationship to be established between the Court and the United Nations. If the costs of proceedings under the Statute are to be met by States parties rather than through the United Nations system, special provision will need to be made to cover the costs of trials pursuant to article 23 (1).

(8) Article 23 (2) deals with the specific case of a charge of aggression. Any criminal responsibility of an individual for an act or crime of aggression necessarily presupposes that a State had been held to have committed aggression, and such a finding would be for the Security Council acting in accordance with Chapter VII of the Charter to make. The consequential issues of whether an individual could be indicted, for example, because that individual acted on behalf of the State in such a capacity as to have played a part in the planning and waging of the aggression, would be for the Court to decide.

(9) Although a Security Council determination of aggression is a necessary preliminary to a complaint being brought in respect of or directly related to

the act of aggression, the normal provisions of the draft Statute with respect to acceptance of the jurisdiction and the bringing of a complaint apply, unless the Security Council also acts under article 23 (1) with respect to the aggression.

(10) One member of the Working Group preferred that the jurisdiction of the Court over crimes referred to in article 20 (a) to (d) should be dependent in all cases on the prior authorization of the Security Council, given the inevitable implications for international peace and security inherent in such situations. The Working Group did not support this suggestion, although it recognized that in the case where the Security Council had already taken action under Chapter VII, issues of the relationship between that action and the Court's jurisdiction could arise, a matter dealt with in paragraph 3.

(11) Another member pointed out that in paragraphs 1 and 2 of article 23, the exercise of the competences pertaining to the Security Council in its relationship with the exercise of the competences pertaining to the Court was envisaged as a "preliminary question" ("cuestión prejudicial" in Spanish), as known in some legal systems. By way of example, paragraphs 2 and 3 of article 177 of the Treaty instituting the European Economic Community were mentioned.

(12) Paragraph 3 prevents a prosecution from being commenced, except in accordance with a resolution of the Security Council, in relation to a situation with respect to which Chapter VII action is actually being taken by the Council. It is an acknowledgement of the priority given by Article 12 of the Charter of the United Nations, as well as for the need for coordination between the Court and the Council in such cases. On the other hand it does not give the Council a mere "negative veto" over the commencement of prosecutions. It is necessary that the Council should be acting to maintain or restore international peace and security or in response to an act of aggression. Once the Chapter VII action is terminated the possibility of prosecutions being commenced under the Statute would revive.

(13) Some members of the Working Group took the view that paragraph 3 was undesirable, on the basis that the processes of the Statute should not be prevented from operating through political decisions taken in other fora.

(14) More generally, the view was also expressed by certain members that, though it was clear that provisions of the United Nations Charter might be paramount, it was unwise for the Commission to seek to provide in the Statute for situations in which Charter provisions, such as Chapter VII, ought to apply. United Nations Charter interpretation or application - in politically sensitive situations - was a complex and difficult responsibility to be undertaken only in light of prevalent United Nations practice. Moreover, defining the role of the Security Council with respect to the Statute was a matter for appropriate consultation, by appropriate representatives of the General Assembly with appropriate representatives of the Security Council.

(15) There was also the consideration that article 23 would introduce into the Statute a substantial inequality between States members of the Security Council and those that were not members, and, as well, between the permanent members of the Security Council and other States. It was not likely to encourage widest possible adherence of States to the Statute. Thus, the preferable course, in this view, was for article 23 not to be included in the Statute, but for a savings clause to be included as a preambular paragraph in the covering treaty, to which the Statute would be an annex, which would provide for the paramountcy of the Charter. Such a savings clause is found in the preamble to the 1974 General Assembly resolution on the definition of "aggression" which states that: "Nothing in the definition shall be interpreted as in any way affecting the scope of the provisions of the Charter with respect to the functions and powers of the organs of the United Nations".

Article 24. Duty of the Court as to jurisdiction

Commentary

This article is intended to spell out the duty of the Court (and of each of its organs, as appropriate) to satisfy itself that it has jurisdiction in a given case. Detailed provisions relating to challenges to jurisdiction are contained in article 34. But even in the absence of a challenge there is an ex officio responsibility on the Court in matters of jurisdiction.